Supreme Court, U.S.
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No.

In the Supreme Court of the United States

ALONSO ALVINO HERRERA,

Petitioner,

v.

STATE OF OREGON,

Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals of the State of Oregon

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PETITION FOR A WRIT OF CERTIORARI

EUGENE VOLOKH
Counsel of Record
Professor of Law
UCLA School of Law
Academic Affiliate
Mayer Brown LLP
405 Hilgard Ave.
Los Angeles, CA 90095
(310) 206-3926
volokh@law.ucla.edu

Counsel for Petitioner

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTION PRESENTED

In *McDonald* v. *City of Chicago*, 130 S. Ct. 3020 (2010), this Court held that "incorporated Bill of Rights protections 'are all to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment.'"

This Court has also held that the Sixth Amendment requires a *unanimous* jury verdict to convict a person of a crime. The question presented is:

1. Whether the Sixth Amendment, as incorporated against the States by the Fourteenth, likewise requires a unanimous jury verdict to convict a person of a crime.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Alonso Alvino Herrera, respectfully petitions for a writ of certiorari to review the judgment of the Oregon Court of Appeals in this case.

OPINIONS BELOW

The Oregon Court of Appeals decision, App., *infra*, p. 1a, is unreported, but relies on *State* v. *Cobb*, 198 P.3d 978 (Or. Ct. App. 2008), review denied, 213 P.3d 578 (Or. 2009). The Oregon Supreme Court decision denying review, App., *infra*, p. 3a, is unreported. The trial court issued no opinion.

JURISDICTION

The Oregon Supreme Court denied review on June 11, 2010. App., *infra*, p. 3a. This Court has jurisdiction under 28 U.S.C. § 1257(a). See *Prune Yard Shopping Ctr.* v. *Robins*, 447 U.S. 74, 79 (1980) ("a state constitutional provision is a 'statute' within the meaning of § 1257(2)," a then-existing provision that was analogous to the current § 1257(a)).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides,

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed * * *.

The Fourteenth Amendment to the United States Constitution provides,

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law * * *.

Article I, section 11, of the Oregon Constitution provides,

> In all criminal prosecutions, the accused shall have the right to public trial by an impartial jury in the county in which the offense shall have been committed; * * * provided, however, that in the circuit court ten members of the jury may render a verdict of guilty or not guilty, save and except a verdict of guilty of first degree murder, which shall be found only by a unanimous verdict * * *.

STATEMENT

1. This case presents the important and recurring question whether it is constitutional for Oregon and Louisiana, alone among the States, to allow criminal convictions by nonunanimous jury verdicts.

This Court recently reaffirmed that "incorporated Bill of Rights protections 'are all to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment.'" *McDonald* v. *City of Chicago*, 130 S. Ct. 3020, 3035 (2010) (plurality opinion); *id.* at 3058, 3064, 3068 (Thomas, J., concurring in the judgment) (expressing the same view as to scope of incorporation), discussed *infra* p. 6, note 2. And this Court has repeatedly held that the Sixth Amendment mandates jury unanimity for federal convictions. See cases cited *infra* p. 5,

Part I. But the precedential effect of Justice Powell's concurring opinion in *Apodaca* v. *Oregon*, 406 U.S. 404 (1972), has led to the same "two-track" "watered-down" partial incorporation of the Jury Trial Clause that this Court condemned in *McDonald*, 130 S. Ct. at 3035 & n.14 (plurality opinion).

Eight of the nine Justices who decided *Apodaca* would have treated federal and state criminal trials the same way. Four Justices would have rejected a unanimity requirement for both sorts of trials. 406 U.S. at 407–12 (plurality opinion). And four others concluded there was a unanimity requirement for both. *Id.* at 414–15 (Stewart, J., joined by Brennan and Marshall, JJ., dissenting); *id.* at 380–94 (Douglas, J., joined by Brennan and Marshall, JJ., dissenting). Only Justice Powell believed that the jury unanimity requirement, while binding on the federal government, should not be incorporated against the states. *Id.* at 377 (Powell, J., concurring in the judgment). But because Justice Powell's solo opinion dictated the result in that case—affirmance of the conviction—the Jury Trial Clause now applies differently to federal and state trials.

Two states, Louisiana and Oregon, allow nonunanimous convictions; in both, a 10-2 vote suffices to convict. LA. CONST. art. I, § 17; OR. CONST. art. I, § 11; *State* v. *Bertrand*, 6 So. 3d 738, 743 (La. 2009) (citing *Apodaca* to uphold the constitutionality of nonunanimous verdicts); *State ex rel. Smith* v. *Sawyer*, 501 P.2d 792, 793 (Or. 1972) (same).[1] And because

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[1] Though Oklahoma uses nonunanimous juries for some offenses, it should not be classified with Oregon and Louisiana for purposes of this petition's analysis. Oklahoma authorizes nonunanimous juries only for the trial of crimes that are punisha-

this Court has instructed lower courts to "leav[e] to this Court the prerogative of overruling its own decisions," *Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989), state supreme courts will continue to follow *Apodaca* even though it has been undermined by *McDonald*. See *infra* Part III.

This Court should therefore intervene to decide whether criminal defendants ought to enjoy equal "enforce[ment] against the States" of the Jury Trial Clause "'according to the same standards that protect those personal rights against federal encroachment,'" *McDonald*, 130 S. Ct. at 3035, just as gun owners enjoy equal enforcement of Second Amendment rights against state and federal governments.

2. The prosecution argued at trial that Alonso Herrera borrowed a friend's car, and did not bring it back. 1 Tr. of Proceedings 33 (Aug. 25, 2008). Herrera was prosecuted for unauthorized use of a vehicle, OR. REV. STAT. § 164.135, and for possession of a stolen vehicle, *id.* § 819.300. Oregon Court of Appeals Excerpt of Record 2.

Before trial, Herrera's lawyer asked for a jury instruction stating that the jury had to be unanimous to render a verdict. App., *infra*, p. 4a. The court denied the request, *ibid.*, and instructed the jury that, "10 or more jurors must agree on your verdict." 1 Tr. of Proceedings 104. Herrera's attorney preserved her exception to that instruction. App., *infra*, p. 7a.

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ble by no more than six months in jail. OKLA. CONST. art. II, § 19. The Jury Trial Clause is inapplicable to such so-called "petty offenses." *Baldwin v. New York*, 399 U.S. 66, 68–69 (1970) (controlling opinion); *District of Columbia v. Clawans*, 300 U.S. 617, 624 (1937). The Clause's unanimity requirement is thus inapplicable to such offenses as well.

The jury voted 10-2 to convict on the unauthorized use charge, and 11-1 to acquit on the possession of stolen vehicle charge. App., *infra*, p. 6a. On appeal, Herrera argued that the nonunanimous jury verdict violated the Sixth and Fourteenth Amendments. App., *infra*, p. 9a. The Oregon Court of Appeals summarily affirmed, App., *infra*, p. 1a, citing *State* v. *Cobb*, 198 P.3d 978 (Or. Ct. App. 2008), review denied, 213 P.3d 578 (Or. 2009). *Cobb* in turn stated, "to the extent that defendant now invokes *Blakely* v. *Washington*, 542 U.S. 296 (2004), as overruling *Apodaca* v. *Oregon*, 406 U.S. 404 (1972), *sub silentio*, we have previously rejected that contention. *State* v. *Bowen*, 168 P.3d 1208 (2007), *modified on recons.*, 185 P.3d 1129 (2008)." 198 P.3d at 979 (parallel citations deleted).

Herrera petitioned for review to the Oregon Supreme Court, renewing the arguments made below. App. G, *infra*, p. 14a. The Oregon Supreme Court denied review. App., *infra*, p. 3a.

REASONS FOR GRANTING THE PETITION

I. The Oregon Nonunanimous Jury Rule Is Inconsistent with This Court's Holding in *McDonald* v. *City of Chicago*.

Alonso Herrera was convicted by a 10-to-2 vote. Two jurors concluded that the prosecution failed to prove the case beyond a reasonable doubt.

In a federal case, such a vote would not yield a conviction, because the Sixth Amendment requires a unanimous verdict to convict. See, *e.g.*, *Andres* v. *United States*, 333 U.S. 740, 748–49 (1948); *Hawaii* v. *Mankichi*, 190 U.S. 197, 211–12 (1903); see also *Swain* v. *Alabama*, 380 U.S. 202, 211 (1965) (dic-

tum), overruled on other grounds by *Batson* v. *Kentucky*, 476 U.S. 79 (1986). But because of Justice Powell's solo controlling opinion in *Apodaca*, 406 U.S. at 369–77 (Powell, J., concurring in the judgment), the unanimous jury requirement of the Sixth Amendment is not incorporated against the states.

This is a constitutional anomaly. This Court has "abandoned 'the notion that the Fourteenth Amendment applies to the States only a watered-down, subjective version of the individual guarantees of the Bill of Rights.'" *McDonald*, 130 S. Ct. at 3035 (plurality opinion) (quoting *Malloy* v. *Hogan*, 378 U.S. 1, 10–11 (1964)).

Instead, this Court has concluded that "it would be 'incongruous' to apply different standards 'depending on whether the claim was asserted in a state or federal court.'" *Ibid.* This Court has "decisively held that incorporated Bill of Rights protections 'are all to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment." *Ibid.*[2] For example, in holding that the

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[2] Justice Thomas's analysis on this is consistent with the plurality's. Justice Thomas concluded that the Privileges or Immunities Clause applies to the states all the "individual rights enumerated in the Constitution." *McDonald*, 130 S. Ct. at 3068 (Thomas, J., concurring in part and concurring in the judgment). He noted that "privileges" or "immunities" include "the right to a jury trial," a right that stems from "the basic liberties of English citizens." *Id.* at 3064. And in agreeing that the Fourteenth Amendment makes the Second Amendment "'fully applicable to the States,'" *id.* at 3058, he cited the passage in the plurality opinion, *id.* at 3026, that says, "We have previously held that most of the provisions of the Bill of Rights apply with full force to both the Federal Government and the States. Applying the standard that is well established in our case law, we

Double Jeopardy Clause was incorporated, this Court held that, "[o]nce it is decided that a particular Bill of Rights guarantee is 'fundamental to the American scheme of justice,' the same constitutional standards apply against both the State and Federal Governments." *Benton* v. *Maryland*, 395 U.S. 784, 795 (1969) (citation omitted); see also, *e.g.*, *Pointer* v. *Texas*, 380 U.S. 400, 406 (1965) (same, as to the Confrontation Clause); *Malloy*, 378 U.S. at 10–11 (same, as to the privilege against self-incrimination).

In *McDonald*, only one dissenting Justice argued that Bill of Rights provisions should apply differently to the states than to the federal government. 130 S. Ct. at 3092–95 (Stevens, J., dissenting). The other three dissenters also did not endorse that part of Justice Stevens' opinion. *Id.* at 3120 (Breyer, J., joined by Ginsburg and Sotomayor, JJ., dissenting) (noting agreement with some parts of Justice Stevens' opinion, but not with pp. 3092–95). And both the plurality and Justice Thomas rejected Justice Stevens' argument, in the course of reaching their conclusion that the Second Amendment fully applies to state and local governments.

The plurality opinion in *McDonald* did note "one exception to this general rule" that fundamental rights are fully incorporated against the states: "The Court has held that although the Sixth Amendment right to trial by jury requires a unanimous jury verdict in federal criminal trials, it does not require a unanimous jury verdict in state criminal trials." *Id.* at 3035 n.14 (citing *Apodaca*).

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hold that the Second Amendment right is fully applicable to the States."

But the plurality opinion stressed that the *Apodaca* result was not compatible with *McDonald*'s rejection of "the two-track approach to incorporation" (one track for the federal version of a right and one for the state version):

> [The *Apodaca*] ruling was the result of an unusual division among the Justices, not an endorsement of the two-track approach to incorporation. In *Apodaca*, eight Justices agreed that the Sixth Amendment applies identically to both the Federal Government and the States.
>
> Nonetheless, among those eight, four Justices took the view that the Sixth Amendment does not require unanimous jury verdicts in either federal or state criminal trials, and four other Justices took the view that the Sixth Amendment requires unanimous jury verdicts in federal and state criminal trials.
>
> Justice Powell's concurrence in the judgment broke the tie, and he concluded that the Sixth Amendment requires juror unanimity in federal, but not state, cases. *Apodaca*, therefore, does not undermine the well-established rule that incorporated Bill of Rights protections apply identically to the States and the Federal Government.

Ibid. (citations omitted).

Moreover, the *McDonald* plurality opinion rejected the chief justification underlying Justice Powell's "watered-down" incorporation model—the supposed need to protect state "freedom to experiment." Justice Powell reasoned that,

> [I]n holding that the Fourteenth Amendment has incorporated "jot-for-jot and case-for-case" every element of the Sixth Amendment, the Court derogates principles of federalism that are basic to our system. In the name of uniform application of high standards of due process, the Court has embarked upon a course of constitutional interpretation that deprives the States of freedom to experiment with adjudicatory processes different from the federal model. * * *
>
> While the Civil War Amendments altered substantially the balance of federalism, it strains credulity to believe that they were intended to deprive the States of all freedom to experiment with variations in jury-trial procedure. In an age in which empirical study is increasingly relied upon as a foundation for decisionmaking, one of the more obvious merits of our federal system is the opportunity it affords each State, if its people so choose, to become a "laboratory" and to experiment with a range of trial and procedural alternatives.

Apodaca, 406 U.S. at 375–76 (Powell, J., concurring in the judgment). But the *McDonald* plurality disagreed; it concluded that the desire for experimentation cannot justify "watered-down" incorporation, and stressed that experimentation may happen only within constitutional limits:

> We likewise reject municipal respondents' argument that we should depart from our established incorporation methodology on the ground that making the Second Amendment binding on the States and their subdivisions

> is inconsistent with principles of federalism and will stifle experimentation. * * *
>
> There is nothing new in the argument that, in order to respect federalism and allow useful state experimentation, a federal constitutional right should not be fully binding on the States. * * * Throughout the era of "selective incorporation," Justice Harlan in particular, invoking the values of federalism and state experimentation, fought a determined rearguard action to preserve the two-track approach.
>
> Time and again, however, those pleas failed. Unless we turn back the clock or adopt a special incorporation test applicable only to the Second Amendment, municipal respondents' argument must be rejected. Under our precedents, if a Bill of Rights guarantee is fundamental from an American perspective, then, unless *stare decisis* counsels otherwise,[30] that guarantee is fully binding on the States and thus *limits* (but by no means eliminates) their ability to devise solutions to social problems * * *.
>
> * * * * *
>
> Incorporation always restricts experimentation and local variations, but that has not stopped the Court from incorporating virtually every other provision of the Bill of Rights. "[T]he enshrinement of constitutional rights necessarily takes certain policy choices off the table."

130 S. Ct. at 3045–46, 3050 (plurality opinion) (citations and footnotes omitted).

Furthermore, footnote 30, which accompanies the *stare decisis* reference, cites *only* the cases rejecting incorporation of the Grand Jury Clause and the Seventh Amendment. *Id.* at 3046 n.30. It conspicuously fails to cite *Apodaca*, thus reinforcing the doubt the opinion had earlier cast on that case, *id.* at 3035 n.14.

Apodaca's "watered-down" incorporation of the Jury Trial Clause is thus a constitutional anomaly, based on logic that this Court has repudiated in *McDonald*, and that was inconsistent with prior precedent even at the time of *Apodaca* itself. This anomaly is inconsistent with this Court's many holdings that the Jury Trial Clause requires unanimity in federal cases, *e.g.*, *Andres*, *supra*. It is inconsistent with this Court's recent suggestions that unanimity is indeed required by the Jury Trial Clause in state cases. See *Blakely v. Washington*, 542 U.S. 296, 301–02 (2004), and *Apprendi v. New Jersey*, 530 U.S. 466, 477 (2000), discussed *infra* p. 23. It violates the properly understood Jury Trial Clause rights of Oregon and Louisiana criminal defendants. And it undermines the security of other incorporated constitutional rights, by maintaining a precedent that supports watering down those rights as well.

II. The Oregon Nonunanimous Jury Rule Is Inconsistent with the Understanding of the Jury Trial Right as of the Ratification of the Sixth Amendment, as of the Ratification of the Fourteenth Amendment, and Since Then.

The *Apodaca* rule is incompatible with this Court's recent approach of ensuring that Americans retain at least those constitutional rights that were

recognized at the time of the Framing, and that have been traditionally recognized since then. See, *e.g.*, *McDonald*, 130 S. Ct. at 3031–34 (plurality opinion); *Blakely*, 542 U.S. at 312–13; *Crawford* v. *Washington*, 541 U.S. 36, 50–59 (2004). The unanimity requirement was seen as a fundamental part of the right to trial by jury at the time of the Framing, throughout the antebellum era, and when the Fourteenth Amendment was enacted. And it has been seen this way since, both by various Supreme Court decisions, and in the judgment of the states, 48 of which require unanimity for a criminal jury verdict.

The right is therefore "fundamental to *our* scheme of ordered liberty" and "'deeply rooted in this Nation's history and tradition,'" *McDonald*, 130 S. Ct. at 3036 (plurality opinion), is a privilege or immunity of American citizenship, *id.* at 3088 (Thomas, J., concurring in the judgment), and thus applies to the states through the Fourteenth Amendment.

A. The Common Law and Early Constitutional Commentary Uniformly Understood "Trial by Jury" To Require a Unanimous Verdict in Criminal Cases.

The right to a unanimous jury verdict was firmly established when the Bill of Rights was framed. Sir William Blackstone noted it as an essential feature of the right to trial by jury:

> [T]he trial by jury ever has been, and I trust ever will be, looked upon as the glory of the English law. * * * [I]t is the most transcendent privilege which any subject can enjoy, or wish for, that he cannot be affected either in his property, his liberty, or his person, but by the unanimous consent of twelve of his

> neighbours and equals. A constitution, that I may venture to affirm has, under providence, secured the just liberties of this nation for a long succession of ages.

2 BLACKSTONE, COMMENTARIES *378–79. Likewise, Blackstone listed the requirement of "unanimous suffrage" on a jury as part of the protection provided by the jury trial to "the liberties of England," and argued that "inroads upon this sacred bulwark of the nation [the jury trial] are fundamentally opposite to the spirit of our constitution." 4 *id.* *349–50. John Adams took the same view in America, writing that "it is the unanimity of the jury that preserves the rights of mankind." 1 JOHN ADAMS, A DEFENCE OF THE CONSTITUTIONS OF GOVERNMENT OF THE UNITED STATES 376 (Philadelphia, William Cobbett 1797).

While the Bill of Rights was being ratified, Justice James Wilson—"who was instrumental in framing the Constitution and who served as one of the original Members of this Court," *Victor* v. *Nebraska*, 511 U.S. 1, 10 (1994)—stressed the unanimity requirement in his 1790–91 lectures: "To the conviction of a crime, the undoubting and the unanimous sentiment of the twelve jurors is of indispensable necessity." 2 JAMES WILSON, WORKS OF THE HONOURABLE JAMES WILSON 350 (Philadelphia, Lorenzo Press 1804); see also 2 *id.* at 306, 311, 342, 351, 360 (further noting the unanimity requirement).

Justice Wilson's lectures were about law generally, not constitutional law as such. But he was discussing the meaning of "the trial by jury" in criminal cases. *E.g.*, 2 *id.* at 344, 348. And it is the "right to a * * * trial, by an impartial jury" that the Sixth Amendment enshrines as a constitutional command (and that Article III, § 2, cl. 3, "The Trial of all

Crimes, except in Cases of Impeachment, shall be by Jury," likewise enshrines). As George Hay, the United States Attorney in the Aaron Burr trial, put it, "The trial by jury is a technical phrase of the common law. By its insertion in the constitution, that part of the common law which prescribes the number, the unanimity of the jury and the right of challenge is adopted." *United States* v. *Burr*, 25 F. Cas. 55, 141 (C.C.D. Va. 1807).

St. George Tucker, author of the 1803 edition of *Blackstone's Commentaries*, likewise treated the Sixth Amendment as embodying the trial by jury described by Blackstone: His footnote on the Blackstone pages cited above (4 BLACKSTONE *349–50, in 5 ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES 348–51 (Philadelphia, William Y. Birch & Abraham Small 1803)) noted that "the trial by jury" described in Blackstone's text was adopted in America, and secured by the Sixth Amendment. 5 TUCKER, *supra*, at 348–49 n.2. Tucker cited the Sixth Amendment alongside its Virginia analog, which required "a speedy trial by an impartial jury of his vicinage without whose unanimous consent [the defendant] cannot be found guilty." *Ibid.* And he wrote that "without [the jurors'] unanimous verdict, or consent, no person can be condemned of any crime." 1 *id.* at App. 34.

Justice Joseph Story, in his great constitutional law treatise, likewise stressed that the constitutional "trial by jury" is the same "great privilege" that had been "part of that admirable common law." 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1773, at 652 (Boston, Hilliard, Gray 1833). Justice Story endorsed the Blackstone articulation of the terms of that "great privilege": "I com-

mend to the diligent perusal of every scholar, and every legislator, the noble eulogium of Mr. Justice Blackstone on the trial by jury." 3 *id.* at 654 n.1 (citing "3 Black. Comm. 379, 380, 381; 4 Black. Comm. 349, 350," which note the requirement of unanimity); see also 3 *id.* at 652 n.1 (citing "4 Black. Comm. 349"); 3 *id.* at 653 n.2 (citing "4 Black. Comm[.] 349, 350"). And in a different passage, Justice Story further confirmed that unanimity was understood as a constitutional requirement: His discussion of the constitutional standard for impeachment contrasted the two-thirds requirement for conviction in an impeachment trial with the rule in criminal trials, where "unanimity in the verdict of the jury is indispensable." 2 *id.* § 777, at 248.

Nathan Dane's influential 1823 *General Abridgment and Digest of American Law* similarly treated the Bill of Rights as providing that "the jury in *criminal* matters must be unanimous." 6 NATHAN DANE, GENERAL ABRIDGMENT AND DIGEST OF AMERICAN LAW 226 (Boston, Cummings, Hilliard & Co. 1823). Another volume of the same work echoes this: "The value and excellency of [the criminal trial by jury] is fully declared in all our constitutions, and repeatedly in our laws. In virtue of it * * * the truth of every accusation must be established by the unanimous verdict of twelve [jurors] indifferently chosen." 7 *id.* 335. A Westlaw query for *"dane abr!" "dane's abr!" & date(< 1/1/1900)* reveals that in the 1800s the *Abridgment* was cited by this Court 38 times, and over 950 times by all the cases in the ALLCASES-OLD database.

Unanimity was also part of James Madison's understanding of the right to trial by jury. Madison's original draft of what would become the Sixth

Amendment provided for trial "by an impartial jury of freeholders of the vicinage, with the requisite of unanimity for conviction, of the right of challenge, and other accustomed requisites," 1 Annals of Cong. 452 (1789).

The proposal was ultimately revised, with the "unanimity" language omitted, and there can be two alternative inferences from this change. One is "that Congress eliminated references to unanimity and to the other 'accustomed requisites' of the jury because those requisites were thought already to be implicit in the very concept of jury." *Apodaca*, 406 U.S. at 409–10 (plurality opinion). The other, which the *Apodaca* plurality endorsed, "is that the deletion was intended to have some substantive effect." *Id.* at 410.

But the plurality was mistaken; the historical evidence cited above shows that the unanimity requirement was indeed seen as "implicit in the very concept" of the Anglo-American criminal jury. Protecting the "trial by jury" safeguarded the essential incidents of the trial, such as the unanimity requirement, with no need for a detailed enumeration.

To be sure, the Jury Trial Clause did not constitutionalize all details of the common-law jury. As one early decision explained, "None would contend, at this day, in a trial of a writ of right, for the extraordinary [common-law] jury, called the grand assize, composed of four knights, 'girt with swords,' and who chose twelve other persons to be joined with them." *Dowling* v. *State*, 13 Miss. 664, 681–82 (1846) (holding that departures from common-law jury selection procedures may be constitutionally permissible under the Mississippi Constitution's jury trial provision). One could argue that even the choice of twelve as the number of jurors might be sufficiently arbi-

trary and accidental that some variation would be permitted, see *Williams* v. *Florida*, 399 U.S.86, 90 (1970), though petitioner takes no position on that question.

But, as *Dowling* put it, though "[t]he old common law has been insensibly changed and tempered to our situation and institutions," "the constitution must be construed to have adopted the generous privilege of the common law trial by jury in its essential elements." 13 Miss. at 682. Only those features that were "an accidental and not an absolute part of that institution, the mere superfluous forms and complicated proceedings of the English courts" are outside the constitutional guarantee. *Ibid.*

The unanimity requirement was indeed not just an "accidental," "superfluous" detail, but an "essential element[]" of the jury trial. It was a part of "our [English] constitution" that protected "the liberties of England" (Blackstone), and that was then accepted in America (as Story stressed). It "preserve[d] the rights of mankind" (Adams). It was "of indispensable necessity" (Wilson), "indispensable" to a criminal jury verdict (Story), part of the American design of "the several powers of government" (Tucker), and part of the trial by jury secured by "all our constitutions" (Dane).

And this view shared by these authorities is no accident, because there is nothing peripheral or arbitrary about the difference between a unanimous finding of guilt beyond a reasonable doubt and a finding of guilt entered over some jurors' dissent. As Justice Wilson put it, "To the conviction of a crime, the *undoubting and the unanimous* sentiment of the twelve jurors is of indispensable necessity," 2 WILSON, *supra*, at 350 (emphasis added). A nonunanimous jury

conviction by definition means that some juror—in petitioners' case, two jurors—found that there was a reasonable doubt about the verdict.

Likewise, Justice Wilson wrote that "it would be difficult to suggest, for [the defendant's] security, any provision more efficacious than one, that nothing shall be suffered to operate against him without the unanimous consent of the delegated body." 2 *id.* at 316. The unanimity requirement is distinctive in this respect, because it is the best protection of its kind for the defendant. The twelve-member jury size, for instance, cannot be defended this way; one can always suggest a slightly larger jury as a theoretical protection for the defendant, yet the jury size has to be limited, so some arbitrary line must be drawn. But unanimity is both a feasible protection for defendants, and the most "efficacious" one for their "security."[3]

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[3] The nonunanimous jury requirement is on balance less "efficacious" for the "security" of defendants, even though it allows 11-1 or 10-2 acquittals as well as 11-1 or 10-2 convictions. First, such splits in favor of acquittal are much rarer than such splits in favor of conviction. See, *e.g.*, CALIF. ADMIN. OFFICE OF THE COURTS, FINAL REPORT OF THE BLUE RIBBON COMMISSION ON JURY SYSTEM IMPROVEMENT 72 (1996), http://www.courtinfo.ca.gov/reference/documents/BlueRibbonFullReport.pdf (reporting, based on Los Angeles County data, that 31% of all hung juries were 11-1 or 10-2 for conviction, and only 11% were 11-1 or 10-2 for acquittal). Second, even under a unanimity rule, prosecutors would be much less likely to retry a case after a 11-1 or 10-2 jury split for conviction than after a similar split for acquittal. Making such a split in favor of acquitting into a legal acquittal would thus help defendants little—but making a similar split in favor of conviction into a legal conviction would disadvantage defendants more.

Similarly, Justice Wilson noted that jurors, who represent the same society whose officials are prosecuting the defendant, may tend to sympathize with the prosecution. In a criminal prosecution, "on one side [is] an individual—on the other, all the members of the society except himself—on one side, those who are to try—on the other, he who is to be tried." 2 *id.* at 315. This means that "the representatives [*i.e.*, the jurors] are not indifferent, and, consequently, may not be impartial." *Ibid.*

Because of this, Justice Wilson explained, "the evidence, upon which a citizen is condemned, should be such as would govern the judgment of the whole society," *ibid.*, which is to say evidence that all reasonable members of society should accept as dispositive. To provide some assurance of this, "we may require the unanimous suffrage of the deputed body [*i.e.*, the jury] who try, as the necessary and proper evidence of that judgment." *Ibid.*

This reasoning cannot be applied directly to jury size, where ten or fourteen might work as a proxy for society's views about as well as twelve would. It cannot be applied to some other historical features of the jury. But the reasoning fully supports Justice Wilson's conclusion that there is no substitute for unanimity in determining whether the evidence is "such as would govern the judgment" of all reasonable members of society. Whenever a presumptively reasonable juror finds a reasonable doubt, there is a basis to think that "the judgment of the whole society" may not support conviction—many other reasonable members of society might share the minority juror's doubts.

Justice Wilson's arguments supporting the unanimity requirement are powerful. And the value of

the unanimity requirement in ensuring the protection of minority groups, promoting deliberation among jurors, and making convictions more credible to the public further supports Justice Wilson's thinking. "Studies suggest that where unanimity is required, jurors evaluate evidence more thoroughly, spend more time deliberating and take more ballots. In contrast, where unanimity is not required juries tend to end deliberations once the minimum number for a quorum is reached." AMERICAN BAR ASS'N, PRINCIPLES FOR JURIES AND JURY TRIALS, WITH COMMENTARY principle 4.B, at 24 (2005), http://www.abanet.org/jury/pdf/final%20commentary_july_1205.pdf.[4]

But whether the unanimity requirement is wise—or for that matter whether the jury trial requirement is wise—is not the main question here. The important point is that the unanimity requirement was understood to be a central, "indispensable" requirement of the right to trial by jury that the Framers knew and constitutionalized. Whatever flexibility the government may have in dispensing with historical features of the jury that are peripheral, ac-

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[4] See, *e.g.*, Dennis J. Devine et al., *Jury Decision Making: 45 Years of Empirical Research on Deliberating Groups*, 7 PSYCHOL. PUB. POL'Y & L. 622, 669 (2001) (discussing data that tends to show that the absence of a unanimity requirement leads to less deliberation); Kim Taylor-Thompson, *Empty Votes in Jury Deliberations*, 113 HARV. L. REV. 1262, 1273 (2000) (same); *id.* at 1264, 1298–99 (noting that the absence of a unanimity requirement may lead to less consideration of the opinions of minority groups); Robert J. MacCoun & Tom R. Tyler, *The Basis of Citizens' Perceptions of the Criminal Jury: Procedural Fairness, Accuracy, and Efficiency*, 12 LAW & HUM. BEHAV. 333, 337–38 & tbl.1 (1988) (noting that the public views unanimous juries as more accurate and fair).

cidental, or unimportant, such flexibility cannot extend to the essential requirement of unanimity.

B. The "Trial by Jury" Was Understood as Requiring a Unanimous Verdict at the Time the Fourteenth Amendment Was Ratified.

The Fourteenth Amendment was said to secure (among other rights) the right to "trial by jury." Cong. Globe, 42d Cong., 1st Sess. app. 85 (1871) (statement of Rep. Bingham); Cong. Globe, 39th Cong., 1st Sess. 2765 (1866) (statement of Sen. Howard) ("right to be tried by an impartial jury of the vicinage"); Cong. Globe, 42d Cong., 2d Sess. 844 (1872) (statement of Sen. Sherman) ("right to be tried by an impartial jury"). And at the time the Fourteenth Amendment was ratified, "trial by jury" in criminal cases continued to be understood as requiring unanimity for conviction.

Michigan Supreme Court Justice Thomas Cooley, the "most famous" of the "late-19th-century legal scholar[s]" made this clear in his "massively popular" treatise. *District of Columbia* v. *Heller*, 128 S. Ct. 2783, 2811 (2008) (so labeling Justice Cooley and his treatise). "The jury must unanimously concur in the verdict." THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 320 (Boston, Little, Brown & Co. 1868). And Justice Cooley joined *Hill* v. *People*, 16 Mich. 351, 358 (1868), which interpreted the Michigan Constitution's jury trial clause as implicitly guaranteeing a jury in which "unanimous agreement" is required for conviction.

Other leading commentators of that period took the same view: "[I]n a case in which the constitution guarantees a jury trial," a statute allowing "a verdict upon anything short of the unanimous consent of the twelve jurors" is "void." 1 JOEL PRENTISS BISHOP, COMMENTARIES ON THE LAW OF CRIMINAL PROCEDURE 532 (Boston, Little, Brown 1866). "That term ['jury'], when spoken of in connection with trial by jury in [the New York Constitution], imports a jury of twelve men whose verdict is to be unanimous. Such must be its acceptation to every one acquainted with the history of common law * * *." THEODORE SEDGWICK, TREATISE ON THE RULES WHICH GOVERN THE INTERPRETATION AND APPLICATION OF STATUTORY AND CONSTITUTIONAL LAW 530 (New York, John S. Voorhies 1857).

"[T]he jury [must] be unanimous in rendering their verdict. * * * The principle once adopted has continued as an essential part of the jury trial * * *." JOHN NORTON POMEROY, AN INTRODUCTION TO MUNICIPAL LAW 78 (New York, D. Appleton & Co. 1864) (so stating even though the author disapproved of the unanimity requirement on policy grounds). "[A] trial by jury is understood to mean—generally—a trial by a jury of twelve men, impartially selected, and who must unanimously concur in the guilt of the accused before a legal conviction can be had." JOEL TIFFANY, A TREATISE ON GOVERNMENT, AND CONSTITUTIONAL LAW 366–67 (Albany, W.C. Little 1867). "[I]t is required that the jury shall be unanimous." JOHN PROFFATT, TREATISE ON TRIAL BY JURY 119 (San Francisco, S. Whitney 1877).[5]

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[5] See *Heller*, 128 S. Ct. at 2789 (citing the Tiffany and Sedgwick treatises as authoritative); *Blakely*, 542 U.S. at 301–02 (like-

These sources show that, when the Fourteenth Amendment was adopted, the right not to be convicted without a unanimous jury verdict was counted "among those fundamental rights necessary to our system of ordered liberty," *McDonald*, 130 S. Ct. at 3042 (plurality opinion), and as among the privileges or immunities of American citizenship, *id.* at 3088 (Thomas, J., concurring in the judgment).

C. The "Trial by Jury" Has Been Seen as Requiring Unanimity Since the Enactment of the Fourteenth Amendment.

More recent sources have continued to see unanimity as an essential part of the Sixth Amendment right to trial by jury. This Court has squarely held this many times as to federal trials. See cases cited *supra* p. 5, Part I. Even Justice Powell conceded this in *Apodaca*. 406 U.S. at 370.

The centrality of unanimous jury trials to the American right to trial by jury is also reflected in this Court's repeated references to such a requirement even as to state prosecutions. Thus, in *Blakely*, this Court reasoned that the beyond-a-reasonable-doubt standard in criminal cases rested on the "longstanding tenet[] of common-law criminal jurisprudence" that "the 'truth of every accusation' against a defendant 'should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbours.'" 542 U.S. at 301 (citing 4 BLACKSTONE, COMMENTARIES *349–50). "The Framers would not have thought it too much to demand that,

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wise as to the Bishop treatise); *Lewis* v. *United States*, 518 U.S. 322, 334 (1996) (likewise as to the Proffatt treatise); *Watt* v. *Alaska*, 451 U.S. 259, 284 (1981) (likewise as to the Sedgwick treatise).

before depriving a man of three more years of his liberty, the State should suffer the modest inconvenience of submitting its accusation to 'the unanimous suffrage of twelve of his equals and neighbours,' * * * rather than a lone employee of the State." *Id.* at 313–14 (again citing Blackstone).

Likewise, in *Apprendi* v. *New Jersey*, this Court described the unanimity requirement as an essential part of the right to trial by jury, and an essential protector of the beyond-a-reasonable-doubt test:

> "[T]o guard against a spirit of oppression and tyranny on the part of rulers," and "as the great bulwark of [our] civil and political liberties," 2 J. Story, Commentaries on the Constitution of the United States 540-541 (4th ed. 1873), trial by jury has been understood to require that "*the truth of every accusation,* whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of [the defendant's] equals and neighbours. . . ." 4 W. Blackstone, Commentaries on the Laws of England [*349–50] (1769).

530 U.S. 466, 477 (2000).

These statements were not intended to reconsider *Apodaca*; the issue was not before this Court in those cases. But they do help show that the requirement of jury unanimity is a fundamental and continuing part of our constitutional traditions, traditions that still prevail throughout 48 of the 50 states. As this Court said in *Burch* v. *Louisiana*, 441 U.S. 130 (1979), in holding that six-member criminal juries must act unanimously, the "near-uniform judgment

of the Nation"—there, too, with only two dissenting states—"provides a useful guide in delimiting the line between those jury practices that are constitutionally permissible and those that are not." *Id.* at 138.

III. This Court's Review Is Warranted Because the Oregon and Louisiana Supreme Courts Cannot Revisit the Issue Until This Court Acts.

Though *Apodaca* is inconsistent with this Court's more recent cases, only this Court can correct the inconsistency. The Oregon and Louisiana Supreme Courts are unlikely to themselves depart from *Apodaca*. As the Louisiana Supreme Court recently held, "we are not presumptuous enough to suppose, upon mere speculation, that the United States Supreme Court's still valid determination [in the plurality opinion of *Apodaca* v. *Oregon*, 406 U.S. 404 (1972),] that non-unanimous 12 person jury verdicts are constitutional may someday be overturned." *State* v. *Bertrand*, 6 So. 3d 738, 743 (La. 2009).

This Court has made clear that, "[i]t is this Court's prerogative alone to overrule one of its precedents." *State Oil Co.* v. *Khan*, 522 U.S. 3, 20 (1997). "If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989); see also *Agostini* v. *Felton*, 521 U.S. 203, 237 (1997) (same). State supreme courts routinely cite *Rodriguez de Quijas*, *Agostini*, and *State Oil* for the

proposition that they *must* adhere to this Court's existing precedents, even when those precedents appear to be inconsistent with the reasoning of later decisions.

Thus, for instance, *Commonwealth* v. *Loadholt*, 923 N.E.2d 1037, 1053 n.10 (Mass. 2010), cited *State Oil* and *Rodriguez de Quijas* in declining to reconsider then-existing precedents holding the Second Amendment inapplicable to the states. It took this Court's decision a few months later in *McDonald* to overrule those precedents.

Likewise, *Johnson* v. *Commonwealth*, 591 S.E.2d 47, 60 (Va. 2004), cited *Rodriguez de Quijas* in "directly reject[ing] Johnson's argument that we should anticipate that the United States Supreme Court may reexamine and reverse its holding in *Stanford* [v. *Kentucky*, 492 U.S. 361 (1989) (holding murderers may be executed even if they committed the murder while under 18),] under an analysis similar to the one that the Court applied in *Atkins* [v. *Virginia*, 536 U.S. 304 (2002)]." It took this Court's decision in *Roper* v. *Simmons*, 543 U.S. 551 (2005), to overrule *Stanford*. See *Johnson* v. *Virginia*, 544 U.S. 901 (2005) (remanding *Johnson* v. *Commonwealth* for consideration in light of *Roper*).

Similarly, *State* v. *Ring*, 25 P.3d 1139 (Ariz. 2001), refused to strike down the Arizona death penalty scheme, under which a judge decided whether the defendant should be sentenced to death. That scheme had earlier been upheld by *Walton* v. *Arizona*, 497 U.S. 639, 648 (1990), but the reasoning of this Court's later decision in *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), suggested that *Walton* was no longer sound. The Arizona Supreme Court in *Ring* reasoned, "[a]lthough Defendant argues that *Walton*

cannot stand after *Apprendi*, we are bound by the Supremacy Clause in such matters. Thus, we must conclude that *Walton* is still the controlling authority and that the Arizona death-penalty scheme has not been held unconstitutional under either *Apprendi* or *Jones*." 25 P.3d at 1151–52. It took this Court's decision in *Ring* v. *Arizona*, 536 U.S. 584 (2002), rev'g *State* v. *Ring*, to overrule *Walton*.

Many other state court cases likewise rely on *Rodriguez de Quijas*, *Agostini*, or *State Oil* in rejecting a criminal defendant's arguments that a precedent of this Court has been undermined by later precedents.[6] These state supreme court decisions may well be correct, given the reasoning of *Rodriguez de Quijas*. But these decisions show that it is for this Court, and not for the Oregon or Louisiana state courts, to decide whether *Apodaca* survives *McDonald* and other recent cases.

IV. *Stare Decisis* Concerns Do Not Justify Preserving the *Apodaca* Anomaly.

The erroneous approach of *Apodaca* ought not be preserved in the name of *stare decisis*.

A. Justice Powell's Solo Concurrence in *Apodaca* Is Not Entitled to *Stare Decisis* Effect.

As explained above, the *Apodaca* concurrence's conclusion—that the Fourteenth Amendment only

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[6] See, *e.g.*, *People* v. *Letner*, 235 P.3d 62, 112 Cal. Rptr. 3d 746, 834 (Cal. 2010); *People* v. *Huber*, 139 P.3d 628, 631 (Colo. 2007); *State* v. *Mizenko*, 127 P.3d 458, 468 (Mont. 2006); *State* v. *Gales*, 658 N.W.2d 604, 627 (Neb. 2003); *State* v. *Rodriguez*, 116 P.3d 92, 97–98 (N.M. 2005); *State* v. *Bacon*, 702 A.2d 116, 122 n.7 (Vt. 1997).

incorporates a "watered-down" version of the Jury Trial Cause—was inconsistent with this Court's past cases incorporating Bill of Rights guarantees. "Remaining true to an 'intrinsically sounder' doctrine established in prior cases better serves the values of *stare decisis* than would following a more recently decided case inconsistent with the decisions that came before it." *Adarand Constructors, Inc.* v. *Pena*, 515 U.S. 200, 231 (1995); see also, *e.g.*, *United States* v. *Dixon*, 509 U.S. 688, 704 (1993) (overruling an earlier decision on the grounds that it "lack[ed] constitutional roots" and was "wholly inconsistent with earlier Supreme Court precedent").

And the concurrence's conclusion has been "undermined by later decisions." See *Arizona* v. *Gant*, 129 S. Ct. 1710, 1728 (2009) (Alito, J., dissenting) (noting this as a factor relevant to the *stare decisis* analysis); *Patterson* v. *McLean Credit Union*, 491 U.S. 164, 173–74 (1989) (likewise). *McDonald* rejected the "watered-down incorporation" model that the *Apodaca* concurrence adopted. 130 S. Ct. at 3035. And *McDonald* likewise undermined the concurrence's chief justification for this model, which was the perceived need to protect state "experimentation" in this area. See *supra* Part I.

The *McDonald* plurality opinion itself suggested—in the course of rejecting the "experimentation" argument—that *stare decisis* would not save the *Apodaca* "watered-down" incorporation doctrine. The opinion stated that Bill of Rights provisions are fully incorporated "unless *stare decisis* counsels otherwise." 130 S. Ct. at 3046 (plurality opinion). But in the accompanying footnote, *id.* at 3046 n.30, it cited only the cases rejecting incorporation of the Grand Jury Clause and the Seventh Amendment, conspi-

cuously omitting *Apodaca* from the list of cases that might be preserved by *stare decisis*.

Moreover, Justice Powell's reasoning is inconsistent with the understanding of the right to jury trial in 1791 and 1868, and with the traditional understanding of the right throughout American history. See *supra* Parts II.A–.B. The opinion has thus been undermined by later precedents that stress the importance of original meaning and history to constitutional interpretation. See, *e.g.*, *McDonald*, 130 S. Ct. at 3031–34 (plurality opinion); *Blakely*, 542 U.S. at 312–13; *Crawford*, 541 U.S. at 50–59.

Justice Powell's experimentation rationale has also been "undermined by experience since its announcement." *Citizens United* v. *FEC*, 130 S. Ct. 876, 912 (2010) (noting this as a factor against the application of *stare decisis*). Since *Apodaca*, not one state has joined Oregon and Louisiana in their experiment. Oklahoma, which had allowed nonunanimous juries for all misdemeanors, shifted to allowing them only in those "petty offense" cases where the Jury Trial Clause does not apply at all, see *supra* note 1. 1989 Okla. Sess. Law Serv. Sen. Jt. Res. 17 (West), enacted as OKLA. CONST. art. II, § 19. Occasional calls to allow nonunanimous criminal jury verdicts in other states have been rejected. See, *e.g.*, *In re Florida Rules of Criminal Procedure*, 272 So. 2d 65 (Fla. 1972) (preserving the unanimity requirement, despite the state Chief Justice's contrary suggestion, 272 So. 2d at 66–69 (Roberts, C.J., concurring in part and dissenting in part), and despite the then-recent *Apodaca* decision).

Even the American Bar Association's brief endorsement of nonunanimous verdicts, on which Justice Powell's concurring opinion relied, 406 U.S. at

377, has been rejected by the ABA itself. In 1975 and 2005, the ABA reaffirmed the necessity of the unanimity requirement. AMERICAN BAR ASS'N, STANDARDS RELATING TO TRIAL COURTS, standard 2.10 & commentary, at 20, 23–24 (1975); AMERICAN BAR ASS'N, PRINCIPLES FOR JURIES AND JURY TRIALS, WITH COMMENTARY, *supra*, principle 4.B, at 23.

Nor has there been evidence that Oregon's and Louisiana's justice systems have become materially more efficient or fair than those of other states because of their acceptance of nonunanimous verdicts. After 40 years, there seems to be little remaining benefit in continuing experimentation.

Stare decisis also has less applicability to fractured decisions—such as *Apodaca*—in which no rationale received five votes. Thus, in *Seminole Tribe* v. *Florida*, 517 U.S. 44 (1996), this Court overruled *Pennsylvania* v. *Union Gas Co.*, 491 U.S. 1 (1989), partly because "a majority of the Court [consisting of the concurring opinion providing the fifth vote and the dissent had] expressly disagreed with the rationale of the plurality," so that the earlier decision had only "questionable precedential value." 517 U.S. at 66. Likewise, in *Apodaca*, five Justices disagreed with the plurality's rationale, and eight Justices disagreed with Justice Powell's rationale.

B. The Suggestion by the *Apodaca* Plurality That Unanimity Is Not Required Even in Federal Criminal Trials Is Not Entitled to *Stare Decisis* Effect.

The *Apodaca* plurality's conclusion—that the Sixth Amendment does not mandate jury unanimity even in federal criminal trials—was inconsistent with a solid line of this Court's decisions and with

the Amendment's original meaning. To the extent that the plurality argued the contrary, its analysis was not "well reasoned." See *Montejo* v. *Louisiana*, 129 S. Ct. 2079, 2089 (2009) (noting this as a factor in deciding whether to apply *stare decisis*).

Moreover, the *Apodaca* plurality opinion rested its conclusion partly on the judgment that "the Sixth Amendment itself has never been held to require proof beyond a reasonable doubt in criminal cases." 406 U.S. at 411. But since *Apodaca*, the Sixth Amendment has indeed been held to require exactly that. "[T]he jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt." *Sullivan* v. *Louisiana*, 508 U.S. 275, 278 (1993). "This Court has repeatedly held that, under the Sixth Amendment, any fact that exposes a defendant to a greater potential sentence must be found by a jury, not a judge, and established beyond a reasonable doubt, not merely by a preponderance of the evidence." *Cunningham* v. *California*, 549 U.S. 270, 281 (2007). The *Apodaca* plurality's reasoning has thus been entirely undermined by later decisions.

C. Revisiting *Apodaca* Would Not Unduly Undermine Reliance Interests.

This Court has long recognized that correcting erroneous decisions about judicial procedure is especially proper. "'Considerations in favor of *stare decisis* are at their acme in cases involving property and contract rights, where reliance interests are involved; the opposite is true in cases . . . involving procedural and evidentiary rules' that do not produce such reliance." *Pearson* v. *Callahan*, 129 S. Ct. 808,

816 (2009) (quoting *Payne* v. *Tennessee*, 501 U.S. 808, 828 (1991)).

And *Apodaca* has not led to reliance of the sort that would justify retaining *Apodaca*'s anomalous result. Only two of the 50 states have adopted nonunanimous jury verdicts. And even in those two states, the criminal justice system has not built any complex edifice on the basis of such verdicts. Mandating unanimity in jury decisionmaking would not require the revision of those states' codes of criminal procedure or evidence. Nor would reversing *Apodaca* undermine any complex constitutional structure that this Court has built on that case; recent decisions are inconsistent with *Apodaca*, not reliant on it.

Of course, mandating jury unanimity for conviction may require retrials in those cases that are on direct review, *Teague* v. *Lane*, 489 U.S. 288, 304, 310 (1989) (plurality opinion); *id.* at 317 (White, J., concurring in part and concurring in the judgment), and in which the objection to a nonunanimous jury was preserved, *United States* v. *Booker*, 543 U.S. 220, 268 (2005). But that has been true in many cases that have reversed erroneous precedents, including many leading incorporation cases, see, *e.g.*, *Mapp* v. *Ohio*, 367 U.S. 643 (1961), overruling *Wolf* v. *Colorado*, 338 U.S. 25 (1949); *Gideon* v. *Wainwright*, 372 U.S. 335 (1963), overruling *Betts* v. *Brady*, 316 U.S. 455 (1942); *Batson* v. *Kentucky*, 476 U.S. 79 (1986), overruling in part *Swain* v. *Alabama*, 380 U.S. 202 (1965). Those cases also applied to other cases that were on direct appeal. *Linkletter* v. *Walker*, 381 U.S. 618 (1965) (so holding as to *Mapp*), disapproved of as to other matters by *Griffith v. Kentucky*, 479 U.S. 314, 321–22 (1987); *Griffith*, 479 U.S. at 328 (so holding as to *Batson*); *Pickelsimer* v. *Wainwright*, 375

U.S. 2 (1963) (per curiam) (applying *Gideon* even on habeas review, which would not be called for if *Apodaca* were overruled, given *Teague*). Yet this did not stop this Court from overruling the earlier decisions—even though such overruling applied to many more states than the two implicated here.

Similarly, the rejection in *Crawford*, 541 U.S. at 60–62, of the Confrontation Clause framework developed in *Ohio* v. *Roberts*, 448 U.S. 56 (1980), required revisiting some cases in which the government had relied on *Roberts*. This Court itself remanded twelve cases for further consideration in light of *Crawford*: *Siler* v. *Ohio*, 543 U.S. 1019 (2004); *Watt* v. *Washington*, 543 U.S. 976 (2004); *Varacalli* v. *United States*, 543 U.S. 801 (2004); *LaFontaine* v. *United States*, 543 U.S. 801 (2004); *Calcano* v. *United States*, 543 U.S. 801 (2004); *Sarr* v. *Wyoming*, 543 U.S. 801 (2004); *Wedgeworth* v. *Kansas*, 543 U.S. 801 (2004); *Ko* v. *New York*, 542 U.S. 901 (2004); *Goff* v. *Ohio*, 541 U.S. 1083 (2004); *Prasertphong* v. *Arizona*, 541 U.S. 1039 (2004); *Shields* v. *California*, 541 U.S. 930 (2004); *Corona* v. *Florida*, 541 U.S. 930 (2004). Doubtless many other cases had to be reconsidered by lower courts. Yet that a government enacted rules believing that they are constitutional "is not a compelling interest for *stare decisis*. If it were, legislative acts could prevent [this Court] from overruling our own precedents, thereby interfering with [this Court's] duty 'to say what the law is.'" *Citizens United*, 130 S. Ct. at 913 (quoting *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

EUGENE VOLOKH
Counsel of Record
Professor of Law
UCLA School of Law
Academic Affiliate
Mayer Brown LLP
405 Hilgard Ave.
Los Angeles, CA 90095
(310) 206-3926
volokh@law.ucla.edu
Counsel for Petitioner

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